UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

In re: RealPage, Inc., Rental Software Antitrust Litigation (No. II)	**Case No. 3:23-md-03071** **MDL No. 3071** **Judge Waverly D. Crenshaw, Jr.** **This Document Relates to:** **All Cases**

REPLY IN SUPPORT OF DEFENDANTS' MOTION TO STAY
ALL DISCOVERY PENDING RULING ON MOTIONS TO DISMISS

I. INTRODUCTION

The Court should stay discovery pending resolution of Defendants' Motions to Dismiss because the Court's decision on those Motions should significantly reduce the burden and expense on Defendants and non-parties by narrowing discovery or avoiding it altogether for some or all Defendants. Plaintiffs identify no prejudice from any stay. The Court should grant this Motion.

II. ARGUMENT

A. Plaintiffs Misstate Defendants' Burden

Plaintiffs wrongly argue that Defendants must show "irreparable injury" or a "pressing need for delay." (Opp. 2.) Their cited cases for these heightened standards do not address a stay of discovery—instead, they concern motions to stay *all proceedings*.[1] Defendants stated the correct standard in their opening brief. This Court need only "weigh the burden of proceeding with discovery" on Defendants "against the hardship which would be worked by a denial of discovery." *Bolletino v. Cellular Sales of Knoxville, Inc*., No. 3:12-CV-138, 2012 WL 3263941, at *1 (E.D. Tenn. Aug. 9, 2012). That balancing test weighs decidedly in Defendants' favor.

B. Defendants Have Met Their Burden to Establish Prejudice in the Absence of a Stay of Discovery

Plaintiffs' argument that Defendants will suffer no prejudice absent the stay of discovery they seek is meritless. Plaintiffs claim "Defendants . . . devote much of their brief lodging various facts about Defendants that are irrelevant to the present inquiry." (Opp. 3-4.) But these are—per Plaintiffs' own cited authority—the "specific facts that show a clearly defined and serious injury resulting from the discovery sought." (*Id.* at 3 (citation omitted).) Plaintiffs neither refute nor

[1] *See Int'l Bd. of Elec. Workers, Loc. Union No. 2020, AFL-CIO v. AT&T Network Sys. (Columbia Works)*, 879 F.2d 864 (6th Cir. 1989) (evaluating a motion to stay all proceedings pending the resolution of another lawsuit); *Ohio Env't Council v. U.S. Dist. Ct., S. Dist. of Ohio*, 565 F.2d 393, 396 (6th Cir. 1977) (evaluating the district court's entry of an order staying all proceedings).

dispute the broad, complex scope of discovery Defendants described or the substantial expense and burden it will inflict on Defendants. Plaintiffs' recent proposed case schedule highlights this reality and confirms the need for a stay. For example, they want to frontload structured data productions, which they do not dispute is substantial, complex, and very costly to collect, process, and produce. (*See* Dkt. 387-1 at 3.) Plaintiffs want *no* limits on document requests, and even their proposal for initial disclosures is far broader than what Rule 26 requires. This Court's impending decision on Defendants' dispositive motions may obviate much or all of the discovery Plaintiffs seek for some or all Defendants—and Defendants will not recoup any discovery costs if the Court dismisses this case or individual Defendants from the case.

Plaintiffs dismiss the unrefuted prejudice to Defendants as "generalized grievances." (Opp. 4.) It is unclear what that means or why it matters here. Plaintiffs cannot refute Defendants' point that a discovery stay avoids the prejudice to Defendants and that courts regularly grant stays like this, especially in antitrust cases which the courts recognize involve far broader and more costly discovery than the types of cases Plaintiffs cite.[2] The discovery Plaintiffs seek—including enormous data productions and no limits on document requests—goes well beyond the much narrower discovery at issue in their cited cases. For example, Plaintiffs rely heavily on *Amos v. Lampo Grp., LLC*, No. 3:21-cv-00923, 2023 WL 3590676 (M.D. Tenn. May 22, 2023). But that was a civil rights case brought by a single plaintiff against a single company and its president; and

[2] *See, e.g.*, *Crowder v. LinkedIn Corp.*, No. 22-cv-00237-HSG, 2023 WL 2405335, at *8 (N.D. Cal. Mar. 8, 2023) (finding that "'[i]t is sounder practice to determine whether there is any reasonable likelihood that plaintiffs can construct a claim before forcing the parties to undergo the expense of discovery'" (citation omitted)); *Cal. Crane Sch., Inc. v. Google LLC*, No. 21-cv-10001-HSG, 2022 WL 1271010, at *1 (N.D. Cal. Apr. 28, 2022) (granting stay of discovery in part because "forcing Defendants to spend time and resources on [discovery] . . . before the Court has an opportunity to assess whether Plaintiff has pled any plausible claims against them may subject Defendants to undue burden and expense").

there, the court merely affirmed a magistrate judge's ruling, under an abuse of discretion standard, allowing a single deposition of the individual defendant to occur while a motion to dismiss was pending. *Id.* at *2. Plaintiffs cite inapposite cases[3] and do not respond to the numerous antitrust cases Defendants cite where courts often grant discovery stays.

Plaintiffs instead misstate the law. They claim that "Defendants argue that '[p]ursuant to *Twombly*, district courts must assess the plausibility of an alleged illegal agreement *before* parties are forced to engaged in protracted litigation and bear excessive discovery costs.' Defendants are incorrect[.]" (Opp. 5.) But this is not simply Defendants' argument—this is a *verbatim quote* from the Sixth Circuit in *In re Travel Agent Comm'n Antitrust Litig.*, 583 F.3d 896, 908-09 (6th Cir. 2009) (emphasis in original)). Plaintiffs betray the frailty of their position in dismissing the Sixth Circuit's own words as an "incorrect" statement of the law. It is indeed the law, and it controls. And while it is of course true that a pending motion to dismiss does not "require" a stay in all cases, that is not Defendants' argument; nor does the lack of any such "requirement" bear on the compelling reasons for why a stay is warranted on the facts here. In short, "[a] plaintiff is not entitled to discovery before a motion to dismiss, and dismissal under Rule 12(b)(6) helps protect defendants from expending resources on costly discovery for cases that will not survive summary judgment." *Kolley v. Adult Protective Servs.*, 725 F.3d 581, 587 (6th Cir. 2013).

The recent decision in *Gibson v. MGM Resorts* highlights the weakness of Plaintiffs' Response. Brought by some of the same counsel representing Plaintiffs here, *Gibson* involves at a high level a similar antitrust theory, alleging that "certain Las Vegas hotels used a common third-

[3] *See, e.g., United States ex rel. Cutler v. Cigna Corp.*, No. 3:21-cv-00748, 2023 WL 2552340 (M.D. Tenn. Mar. 3, 2023) (False Claims Act case); *Collabera, Inc. v. Liggett*, No. 3:21-cv-00123, 2021 WL 6496801 (M.D. Tenn. June 21, 2021) (breach of contract case); *CHS/Cmty. Health Sys., Inc. v. Med. Univ. Hosp. Auth.*, No. 3:20-cv-00163, 2021 WL 5863598 (M.D. Tenn. Jan. 4, 2021) (same).

party algorithm to artificially inflate hotel prices." (Dkt. 371-1 at 1.) In *Gibson*, defendants agreed to certain limited discovery[4] and moved to stay all other discovery pending the resolution of their motions to dismiss. The court held that a stay of discovery was "appropriate" because (1) "the dispositive motions—because they are on the pleadings—can be decided without further discovery" and (2) "[d]efendants . . . established good cause by pointing to the burden and expense of discovery." *Id.* at 7. The court found that the second factor "is particularly poignant given the Supreme Court and Ninth Circuit's discussions cautioning district courts to remain cognizant of the burdens that anti-trust discovery can cause." *Id.* This rationale applies with equal force here, given the similar theory and procedural posture of the two cases. Plaintiffs dismiss *Gibson* as an out-of-circuit decision, but that in no way undermines its reasoning in a similar posture. Plaintiffs attempt to distinguish it by noting that the *Gibson* defendants had been served with discovery requests and agreed to provide very limited discovery (i.e., respond to two narrow interrogatories, provide organizational charts, and negotiate ESI and protective orders) while the motions were pending. But Defendants here are already negotiating ESI and protective orders and have offered to negotiate deposition and expert discovery protocols and produce initial disclosures under Rule 26(a). The Court should stay all other discovery much like the *Gibson* court did.

C. Plaintiffs Do Not Establish Any Harm from a Stay of Discovery

In contrast to the substantial burden and expense Defendants will (perhaps needlessly) incur from the expansive discovery Plaintiffs seek, Plaintiffs fail to show any countervailing harm from the stay Defendants seek. The closest Plaintiffs even come to articulating any sort of harm is their argument that, "if Defendants are violating the antitrust laws, then Plaintiffs would indeed

[4] One defendant had not previously agreed to any discovery and the court required that defendant to provide the same limited discovery as the other defendants.

be *severely* prejudiced by a stay regardless of whether injunctive relief is sought."[5] (Opp. 8 (emphasis in original).) But this "if" goes to the critical question before the Court—on the pending dispositive motions—of whether Plaintiffs have even alleged a plausible antitrust violation. They are not entitled to any presumption that Defendants are violating the antitrust laws. Rather, the Court "must assess the plausibility of an alleged illegal agreement *before* [the] parties are forced to engage in protracted litigation and bear excessive discovery costs." *Travel Agent*, 583 F.3d at 908-09 (emphasis in original). This is particularly true here, where the claims suffer from many serious deficiencies and are based on a novel theory about the use of different software solutions in different ways by dozens of differently-situated Defendants, many of whom do not compete with each other in the same markets. If the mere possibility of an antitrust violation were enough to defeat a discovery stay as Plaintiffs wrongly argue, courts would never stay discovery in antitrust cases. But the reality is the opposite, as reflected in the antitrust cases Defendants cited, including *Gibson*, that found no prejudice to the plaintiffs. *See, e.g.*, Dkt. 371-1 at 7; Stay Mem. 6 (citing cases). Plaintiffs ignore these cases and their findings on reasoning that holds equally, or more, true here.

III. CONCLUSION

Defendants respectfully ask that the Court grant Defendants' Motion to Stay Discovery.

[5] Plaintiffs claim that Defendants suggest that "a stay would only be harmful in the event Plaintiffs were seeking injunctive relief." (Opp. 8.) Defendants made no such argument. They merely explained that the lack of a request for injunctive relief here means there is no claim of irreparable harm to Plaintiffs which highlights that a discovery stay will not prejudice Plaintiffs. This fact refutes their argument that a stay will harm them "if Defendants are violating the antitrust laws" since Plaintiffs could recover money damages for any such harm (putting aside that Defendants have not actually violated any antitrust laws).

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CERTIFICATE OF SERVICE

I hereby certify that on July 28, 2023, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all attorneys of record registered on the CM/ECF system.

DATED this 28th day of July, 2023.

/s/ *David D. Cross*
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